

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000531-001 DT

12/16/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
J. Eaton  
Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

LATHOM DEAN LOTT (001)

BRUCE FEDER

REMAND DESK-LCA-CCC  
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number TR 2010-012049.**

Defendant-Appellant Lathom Dean Lott (Defendant) was convicted in Scottsdale Municipal Court of failure to yield while turning left and causing serious physical injury by moving violation. Defendant contends evidence was not sufficient to support the guilty verdicts. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On April 22, 2010, Defendant was cited for failure to yield while turning left, A.R.S. § 28-772; and causing serious physical injury by moving violation, A.R.S. § 28-672. At trial, Jonathan Marks testified he was riding on his motorcycle on April 22, 2010, going north on Scottsdale Road at about 45 m.p.h. (R.T. of Mar. 18, 2011, at 25-26, 29.) As he approached the intersection with Mercer Lane, he was in the far right lane [number 3 or curb lane] and had the green light. (*Id.* at 27-28, 41.) There was no traffic in that lane, so it was clear for him to go through the intersection on the green light. (*Id.* at 29.) He saw a vehicle at the intersection to his right that he thought might enter the intersection, but then he saw a red vehicle turn left in front of him, which caused him to collide with the passenger side of the red vehicle. (*Id.* at 28, 40.) The next memory he had of the incident was a month later when he was at his parents' home in Virginia. (*Id.* at 30.) As a result of the collision, he sustained the following injuries. His left wrist was shattered and he had to have a metal pin implanted in the wrist, and he had not regained full use of the wrist. (*Id.* at 30-33.) A bone had been broken and had protruded through the skin, which resulted in a scar that was still visible. (*Id.* at 31.) His right knee was injured, and he could still feel the effects of that injury. (*Id.* at 33-34.) He would have periodic headaches, and he suffered a memory loss. (*Id.* at 34-35.)

Coli Laird testified she was driving north on Scottsdale Road on April 22, 2010, in the first lane [number 1 or median lane] as the traffic slowed approaching Mercer Lane. (R.T. of Mar. 18, 2011, at 42–44, 48.) She saw the motorcycle traveling north in the second lane [number 2 or center lane], and then saw it change into the number 3 lane. (*Id.* at 44, 46, 48.) At that point, Ms. Laird was the fourth vehicle back from the intersection, and the motorcycle had been the third vehicle back when it changed lanes. (*Id.* at 44–45, 49.) She said the motorcycle had not come to a stop and was still moving when it moved into the number 3 lane, which she described as being “open,” meaning “[t]here wasn’t anyone there.” (*Id.* at 45.) While this was happening, she saw a red truck making a left turn through the intersection. (*Id.* at 46.) When asked, “was the truck almost into its left turn before the motorcycle pulled out from the middle lane,” she answered, “Yes.” (*Id.* at 47.) She said the truck “was about half way” in the intersection when the motorcycle pulled out into the third lane. (*Id.*) In other words, the truck had cleared the number 1 lane and was entering the number 2 lane. (*Id.*) She said the motorcycle accelerated once it moved from the number 2 lane into the number 3 lane. (*Id.* at 48.)

Officer Eric Reed testified he was called to the scene of a collision on April 22, 2010, and spoke to the driver of the red truck involved in the collision. (R.T. of Mar. 18, 2011, at 6.) He identified Defendant as the driver of that truck. (*Id.* at 7.) He said Defendant said he was driving south on Scottsdale Road and attempted to make a left turn at the intersection with Mercer Lane. (*Id.* at 7–8.) He saw the traffic heading north in the number 1 and number 2 lanes was at a standstill, so he started making his left turn lane by lane. (*Id.* at 8–9, 11.) As his truck was in the number 3 lane, a motorcycle heading north in that lane collided with his truck. (*Id.*) He said he tried to make an evasive maneuver, but was unable to do so. (*Id.* at 8.)

Officer Ken Strohmeier testified he went to the scene of a collision on April 22, 2010, at Scottsdale Road and Mercer Lane. (R.T. of Mar. 18, 2011, at 13–14.) From talking to the witnesses, he determined the traffic heading north on Scottsdale Road was backing up in the number 1 and number 2 lanes, but the number three lane was clear and the light was green. (*Id.* at 14–16.) As far as he could determine, the traffic signal was working properly. (*Id.* at 17.)

Doctor Catherine Foll testified about her views of the victim’s injuries based on her treatment of him in April 2010. (R.T. of Mar. 18, 2011, at 51–52.) The extent of her testimony was about the victim’s possible loss of memory. (*Id.* at 52–57.) She noted the reports from the emergency room showed the victim had lost consciousness, and the victim was in the hospital for 2 weeks. (*Id.* at 58.)

After hearing the testimony and the arguments of the attorneys, the trial court found the State had proved beyond a reasonable doubt Defendant made an improper left turn, and further found the State had proved the collision caused the victim to have serious physical injuries. (R.T. of Mar. 18, 2011, at 69–70, 70–71, 72–73, 74.) The trial court then imposed sentence. (*Id.* at 71, 74.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

MARICOPA COUNTY

LC2011-000531-001 DT

12/16/2011

II. ISSUES: WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE GUILTY VERDICTS.

A. *Failure to yield while turning left, A.R.S. § 28-772.*

Defendant contends the evidence was not sufficient to support the guilty verdict for failure to yield while turning left. That statute provides as follows:

The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to a vehicle that is approaching from the opposite direction and that is within the intersection or so close to the intersection as to constitute an immediate hazard.

A.R.S. § 28-772. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jury, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present case, the evidence showed Defendant (1) was the driver (2) of a vehicle (3) within an intersection (4) intending to turn left, and that Defendant (5) did not yield the right-of-way (6) to a vehicle approaching from the opposite direction. Further, because the two vehicles collided, the evidence showed the other vehicle was so close to the intersection that it constituted an immediate hazard. The evidence was thus sufficient to support the verdict of guilty of violating A.R.S. § 28-772.

Defendant contends, however, the only reason the victim’s vehicle was “so close to the intersection as to constitute an immediate hazard” was the victim changed lanes from the number 2 lane to the number 3 lane, essentially contending that, if the victim had not changed lanes, the victim’s vehicle would not have been an immediate hazard. Defendant is essentially making the same kind of argument that was rejected in *Ieronimo v. Hagerman*, 93 Ariz. 357, 380 P.2d 1013 (1963). In that case, Ieronimo was traveling west on Indian School Road approaching 7<sup>th</sup> Avenue, and Hagerman was traveling east on Indian School Road approaching 7<sup>th</sup> Avenue, when Hagerman turned left in front of Ieronimo, causing a collision. At that time, A.R.S. § 28-701(E) required a driver to drive at an appropriately reduced speed when approaching or crossing an intersection. See *Wolfe v. Ornelas*, 84 Ariz. 115, 117-18, 324 P.2d 999, 1000 (1958). Hagerman claimed that, if Ieronimo had reduced his speed, he would not have been so close to the intersection as to constitute an immediate hazard. The court relied on *Wolfe* and held the controlling statute was A.R.S. § 28-701(A), which required a driver to drive at a speed that is reasonable and

prudent under all conditions, and thus if the speed a driver is traveling is reasonable and prudent, the defendant is not required to reduce that speed just because the driver is approaching an intersection. In the present case, it is true that, if the victim had stayed in the number 2 lane, he would have been behind two other vehicles and would not have been proceeding through the intersection, thus he would not have posed any hazard at all. But just as there was no statute that required Ieronimo to reduce his speed, there was no statute that required the victim here to remain in the number 2 lane. Because the victim had the right to change from the number 2 lane and travel through the intersection in the number 3 lane, he was rightfully “so close to the intersection as to constitute an immediate hazard,” and thus Defendant was required to yield right-of-way to the victim. The evidence thus supported the trial court’s verdict.

*B. Causing serious physical injury by moving violation, A.R.S. § 28–672.*

Defendant contends the evidence was not sufficient to support the guilty verdict for causing serious physical injury by moving violation. That statute provides as follows:

A. A person is guilty of causing serious physical injury or death by a moving violation if the person violates any one of the following and the violation results in an accident causing serious physical injury or death to another person:

....

4. Section 28–772.

....

I. For the purposes of this section, “serious physical injury” has the same meaning prescribed in § 13–105.

A.R.S. § 28–672. “Serious physical injury” is defined as follows:

“Serious physical injury” includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

A.R.S. § 13–105(38). Again, when considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jury, but whether there is a complete absence of probative facts to support its conclusion. *Mauro*, 159 Ariz. at 206, 766 P.2d at 79.

In *State v. Pena*, 209 Ariz. 503, 104 P.3d 873 (Ct. App. 2005), the victim had the following injuries:

The cut to the victim’s ear penetrated all layers of skin, and police believed that it was a clean cut that must have been caused by a sharp object. The plastic surgeon who stitched the cuts noted no nerve or muscle damage and testified that the cut was consistent with a razor blade but not a fingernail or thumbnail. The healing process for scars takes eighteen months, during which the appearance of the scar would diminish, but the scar itself would not get smaller. At the time of trial, which occurred four months after the injury, the victim still had a scar on his face.

*Pena* at ¶ 4. The court held as follows:

The evidence was sufficient to establish serious and permanent disfigurement. The evidence demonstrated that the victim's scar would diminish in appearance but would not disappear completely, creating a "serious and permanent disfigurement" that constitutes "serious physical injury."

*Pena* at ¶ 9. In the present case, the victim had a scar that had been caused by the broken bone protruding through the skin, and that scar was still visible 11 months after the collision. Further, the victim had a broken wrist that required the insertion of a metal pin to repair the fracture. The victim still had not regained full mobility of his wrist. The collision had caused damage to the victim's knee, and the victim was still feeling the effects of that injury. The victim was unconscious when taken from the scene of the collision, spent 2 weeks in the hospital, did not remember anything that happened during the month after the collision, and was still suffering a memory loss. Based on this evidence, this Court concludes the record showed Defendant caused the collision and the collision caused serious physical injury to the victim.

Defendant cites *State v. George*, 206 Ariz. 436, 79 P.3d 1050 (Ct. App. 2003), in support of his contention that the victim did not suffer serious physical injury. In that case, the defendant shot the victim, with the bullet entering the right side of the victim's neck and exiting her right armpit, and the victim was in the hospital for only 2 days before being released. *George* at ¶ 2. The court noted:

The state presented no evidence that the injury itself had exposed J. to a reasonable risk of death or had caused her to suffer serious or permanent disfigurement. We must therefore determine whether the state presented sufficient evidence from which reasonable jurors could have concluded beyond a reasonable doubt that the injury had seriously impaired her health or caused her to suffer a protracted impairment of the use of her arm.

*George* at ¶ 5. The court then concluded as follows:

Here, the state presented sufficient evidence from which a jury could reasonably have concluded that J. had suffered a "temporary but substantial" impairment of the use of her arm and a "temporary but substantial" impairment of her health. However, the state presented no evidence that J.'s injuries had caused her to suffer a sustained impairment of her health or a protracted impairment of the use of her arm. The physician who had treated J. at the hospital was the state's only expert. He testified that she had demonstrated impaired mobility of her arm during the 2 days she had been in the hospital. He refused to speculate on how long she might have continued to suffer such impairment. Because the evidence showed nothing more than that J. had experienced 2 days of impaired mobility, we cannot say there was sufficient evidence that she had suffered a "protracted impairment," given our conclusion on the legislature's intent that such impairment be substantial and grave before it may be regarded as protracted.

And, even though we view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against George, we conclude there was also insufficient evidence to support a finding that J. had suffered a "serious impairment of health." Again, the evidence merely showed that her mobility had been impaired for 2 days. And although a gunshot wound may, in most circumstances, result in severe injuries that seriously impair the victim's health, the mere fact that a victim has been shot, without more, does not warrant that finding. Rather, the gravity of the injuries and the effect on the victim's health must be established by the evidence beyond a reasonable doubt. The state failed to present such evidence here. Accordingly, the jury could not have lawfully found George guilty beyond a reasonable doubt of aggravated assault resulting in serious physical injury.

*George* at ¶¶ 13–14. Thus, in *George*, the only evidence was what had happened in the 2 days after the defendant shot the victim. In the present case, there was testimony the victim spent 2 weeks in the hospital, and the evidence presented was of the victim's condition 11 months after the collision. This Court thus does not consider *George* as controlling in this situation.

### III. CONCLUSION.

Based on the foregoing, this Court concludes the evidence was sufficient to support the verdicts.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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